

No. 21,296

United States Court of Appeals
For the Ninth Circuit

ANNA L. SANCHEZ,

Appellant,

vs.

KANO KAWAMURA,

JAPANESE CONSULATE, et al.,

Appellees.

BRIEF FOR APPELLEES

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STATEMENT OF FACTS

Although this court has denied a motion to augment the record on appeal, appellant has included much matter, not part of this record, in her statement of facts. The facts appearing from the record before this court are simply these:

Appellant has filed a complaint alleging she suffered certain personal injuries on September 1, 1964, due to the negligence of appellee Kawamura, a vice-consul of Japan. Her complaint was filed on November 26, 1965, more than one year after the date of the accident. Appellee moved for a dismissal of the action on the ground that it was barred because it was not filed within one year after the accrual of the cause of action. The district court granted the motion. A judgment of dismissal was entered on July 26, 1966, and this appeal followed.

QUESTION PRESENTED

The question raised is whether California's one year statute of limitations applies to an action for personal injuries suffered in California which is brought against a vice-consul of a foreign country in federal district court.

ARGUMENT

- I. THIS ACTION IS ONE SEEKING TO ENFORCE RIGHTS AND DUTIES CREATED BY THE STATE OF CALIFORNIA, RATHER THAN ONE SEEKING TO ENFORCE A RIGHT CREATED BY FEDERAL STATUTE.

Appellant's action lies within the exclusive original jurisdiction of the district courts. 28 USC §1351.

An examination of that code section shows that it does not purport to create any new right or cause of action. In the absence of the statutory provision, an action against a consul or vice-consul could be brought in a state court, because diplomatic immunity does not extend to such officials.

22 USC §252;

Auer v. Costa (D.C. Mass. 1938), 23 F. Supp. 22.

28 USC §1351 merely specifies in what court already existing "actions and proceedings" shall be tried. Its effect is similar to the "diversity" provision, 28 USC §1332. Each of these two sections confers federal jurisdiction because of the status of the parties involved. From the fact that 28 USC §1351 deals with certain official representatives of foreign states, it would seem that its purpose is the same as the pur-

pose behind the "diversity" provision; namely, "assurance to non-resident litigants of courts free from susceptibility to potential local bias."

Guaranty Trust Co. v. York, 326 U.S. 99, 111,
65 S.Ct. 1464, 1469.

In this respect, 28 USC §1351 must be distinguished from federal enactments which create new and distinct rights of action which did not previously exist, such as the Tort Claims Act, the FELA or the Jones Act.

The present action, being one for personal injuries incurred in California, is plainly one which arose under California law but which, for policy reasons, Congress has decreed shall be adjudicated solely in the federal courts.

II. WHEN ENFORCING RIGHTS OR DUTIES CREATED BY STATE LAW, FEDERAL COURTS APPLY STATE STATUTES OF LIMITATION.

When a federal court sits to decide a claim based on a right derived from state law, it applies state law regarding statutes of limitations and "if a plea of the statute of limitations would bar recovery in a State Court, a federal court ought not to afford recovery."

Guaranty Trust Company v. York, supra, 326 U.S. at 107, 65 S.Ct. at 1469.

Thus, the California one-year statute of limitations for personal injury actions is properly applicable to this action.

California Code of Civil Procedure §340(3).

III. THERE IS NO BASIS FOR APPLYING SOME OTHER
STATUTE OF LIMITATIONS TO THIS ACTION.

Appellant chose, following the original ruling by the district court, to stand on her original complaint, and on her claim that the one-year statute was not applicable to that complaint. She designated as error the court's dismissal of that complaint. (Cl. Tr. pages 24-25.)

Appellant has not pointed out any policy reasons for not applying the one-year statute. If the policy behind 28 USC §1351 is, as appears, to afford consuls a forum free from potential local bias, that policy would be best effectuated by applying the same statute of limitations to them when sued for negligently-caused personal injuries occurring in California as would be applied to private persons sued on the same basis in California state courts. Certainly applying a longer limitations period to cases against defendant consuls than against private defendants would not carry out the purpose of the statute.

Of practical importance is the question, unanswered by appellant, of just what limitation period, if not one year, should be applied to cases against vice-consuls. Apparently appellant wants the period to remain indefinite, by applying only principles of laches. This would hardly result in equal treatment of consuls and vice-consuls on the one hand and private defendants on the other hand. It would, however, create uncertainty and confusion as to how long one had after the accrual of rights against consuls to file an action to vindicate those rights.

Appellant, citing "uniformity of treatment for vice-consuls and consuls of foreign states" as the purpose behind the statute, concludes that some single statute of limitations should be applied to all personal injury actions against consuls, no matter what state of the Union the cause of action arose in. In so concluding, appellant misconstrues the "uniformity" which is sought. The purpose is not to afford each consul the same treatment as every other consul, but rather to afford each consul the same treatment as would be afforded a private citizen sued on an identical cause of action. This uniformity of treatment, or perhaps more appropriately, equality of treatment, is achieved only by applying the same one-year statute of limitations to a personal injury action arising under California law against a consul or vice-consul as is applied to a personal injury action arising under California law against a private party.

SUMMARY

This is an action for personal injuries incurred in an accident which occurred in California. The complaint was not filed until more than one year after the cause of action arose. 28 USC §1351 requires that, because the action was against a vice-consul, it be brought in the district court. But the law applicable to the case is the law of California. In deciding cases arising under state law, federal courts apply to the action the statute of limitations which would be applied by the state under whose law the cause of action arose, in this case, one year.

The policy behind 28 USC §1351, to protect consuls and vice-consuls of foreign states from possible local bias, would not be effectuated by applying a one-year statute of limitations to personal injury actions against private parties, but applying an indeterminate laches period or some longer limitations period to actions against consuls and vice-consuls. The purpose behind 28 USC §1351 will be effectuated by upholding the district court's ruling that the statute of limitations applying to personal injury actions arising in any state against consuls is the same as the statute of limitations for actions arising in the same state against private persons.

Dated, San Francisco, California,
September 12, 1967.

Respectfully submitted,
SEDGWICK, DETERT, MORAN & ARNOLD,
By P. BEACH KUHL,
Attorneys for Appellees.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

P. BEACH KUHL,
Attorney for Appellees.